Office-Supreme Court, U.S.
FILED
Mar 31
APR 1 1965
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 873

CHINA LIQUOR DISTRIBUTING CO., et al.
HULSE IMPORT CO., et al.,
Petitioners,

vs.

THE UNITED STATES,
Respondent.

Reply of Petitioner to Brief for the United States in Opposition

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Reply of Petitioner to Brief for the United States in Opposition

Petitioners respectfully request the Court to consider this reply brief to the Brief of the United States in Opposition to the grant of a writ of certiorari.

The Brief in Opposition states (p. 8) that the taxation of distilled spirits does "not conflict with the requirements that internal taxes be applied similarly to like products, whether imported or domestically produced." An item in *The Times* of London (June 25, 1964, p. 8, col 5) discloses that the British Government disagrees.

According to a Reuter's source in Geneva the British protested (in the Kennedy Round sub-committee on non-tariff barriers) the discriminatory American import practice in taxing Scotch whisky. The complaint "emphasized

that the 14 per cent of water added to each bottle was taxed as though it were pure whisky"—a system used "only against imported bottled whisky."

The British complaints suggest two questions pertinent to this Petition:

I. Does the Brief in Opposition measure up to the needs of the occasion?

II. Can the grant of a Writ of Certiorari help prevent another "chicken war" from developing?

I.

THE BRIEF IN OPPOSITION

The Brief is skillfully written; it reads smoothly. But it carefully avoids the important issues and commits a number of errors.

It Does Not Concern the Question Petitioners Raised.

The protests are limited to *Bottled underproof beverages enumerated in Schedule XX* of the General Agreement. Article II promises them exemption from any increased charges after January 1, 1948 "unless the imposition (1) is a "charge equivalent" to a tax upon the like domestic product, or upon an article from which the import was made, and (2) is applied in accordance with Article III so as not to afford protection to domestic production" (Pet., p. 2). This restriction renders virtually all the Brief in Opposition irrelevant to the questions presented by Petitioners.

The Brief in Opposition (pp. 6, 8 and 9) stresses the fact that since 1868 the formula of Section 28[illegible] (a)(1) has divided "distilled spirits" into two categories, below proof and overproof. It neglects to consider the changes which have occurred since the days of General Grant.

It Does Not Concern the Imports Protested.

Nowhere does the Brief note that now alcoholic beverages are divided commercially into two categories—the bulk spirits which can only be handled by producers and the bottled or case goods of the wholesale and retail trade which are the subject of these protests. (Pet., p. 6).

The Brief is referring to bulk spirits from which the bottled goods are produced when it quotes (p. 7) from *Bercut-Vanderroort & Co. v. United States* (46 CCPA (Customs) 28) that domestic producers and importers may control the composition of their products and pay tax under Section 2800(a)(1) accordingly.

There is no way domestic alcoholic beverages—made from overproof spirits which were bottled underproof—can pay tax on a wine gallon basis. They cannot be bottled in bond at less than proof. Domestic underproof spirits bottled out of bond must be made from overproof spirits to be like the protested imports (Pet., pp. 6-7). As *Bercut* itself said (p. 33) domestic underproof bottled spirits pay no tax at all; they merely reflect the tax on the overproof spirits from which they are made.

It Badly Misconstrues the Parrott Case.

Counsel disagree about the pertinence of the decision of the Ninth Circuit Court of Appeals in *Parrott and Co. v. United States* (156 F.2d 943). Counsel for Petitioners submit that it provides guidance as to how to interpret the words "a charge equivalent" in Article II (2)(a). Counsel for the government deny the relevancy of *Parrott*. The Brief states categorically (p. 8, n. 2) "There the sole issue was *when* the tax attached to the rum produced in the Virgin Islands: the Court held that the tax was to be imposed while the rum was in the Virgin Islands."

Counsel for the Petitioners will let the language of *Parrott* speak for itself (pp. 947-48) adding only emphasis:

> Distilled Spirits Tax. This collected tax, of part of which the complaint seeks a refund, was upon rum alleged to be distilled at more than 100 proof, and later, by the addition of water, was reduced to less than 100 proof, at which lesser proof it was bottled and imported. It was taxed as if it had been distilled at less than 100 proof.
>
> *This is the method of taxing if the rum had been imported from any place other than the Virgin Islands, with which we had no tariff treaty.* Section 2800(a)(1) providing that the tax on imported rum of $2.25 on each proof gallon or wine gallon when below proof is "to be paid by the . . . importer when withdrawn from bond." In our opinion it is error to have taxed the Virgin Islands rum as if it were an importation and that *the cases cited respecting ordinary imported distilled liquors have no application.* Section 2800(a)(4)(B) states that the tax is controlled by Section 3350, supra, specifically providing for rum "coming into the United States from the Virgin Islands, a tax equal to the internal revenue tax imposed in the United States upon like articles of domestic manufacture."
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> * * * * * * *
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> The rums here in issue being distilled in the Virgin Islands were without any requirement that they remain in a federal bonded area until the tax is paid. Congress well knew this when it provided in Section 3350 that *the rum was to be taxed as if produced in the United States.* It must have intended that the tax would be *the equivalent of* that provided by Section 2800(b)(2) for distilled liquors not deposited in bonded warehouses, that is the amount which would have attached as soon as the distillation was complete—here because above proof at the proof gallon rate.

II.

THE ADVANTAGE OF A WRIT OF CERTIORARI

British resentment—probably shared by Canada, the next largest whisky exporter—differentiates the question here from so many customs appeals which concern some minor rule of construction of interest primarily to the immediate litigants. It is important to pay attention to the grivances of a nation's two staunchest friends.

Grounds for a British Sense of Grievance.

When the United Kingdom purchase tax system was claimed to violate Article III, "The United Kingdom admitted that the purchase tax system, although not designed for the purpose of protection, had in practice developed some protective effects" and accordingly agreed to remove the discrimination on imports (Pet., p. 10, n. 12).

When the British were injured by a tax procedure adopted under General Grant, the Court of Customs and Patent Appeals ignored the admonitions of Article II. Instead it assured the exporters that they could ship their products overproof (necessarily in bulk) "and have the commodity taxed accordingly" (Pet., p. A11).

How scant consolation that assurance provided foreign producers appears in the Report of the United States Tariff Commission on Whisky (Washington, March, 1958), p. 34:

> Only a small percentage of the total employment in the distilled liquor industry is engaged in the actual distillation of liquors; most employees are engaged in bottling, labeling, packing and distribution. Changes in employment, therefore, are more closely related to changes in bottled output than to changes in distilling.

The Times of London (June 25, 1963, p. 23, col. 5) watched with concern the way bulk exports to the United States

were replacing bottled goods and noted "The ultimate results need no stressing; they could be of profound significance for the economy of Scotland as a whole."

The Opportunities This Case Offers.

Importers, exporters, and possibly foreign governments, sometimes feel that they do not receive full consideration under the American judiciary system because of the infrequency with which the Supreme Court grants writs of certiorari to the Court of Customs and Patents Appeals. Counsel recognize that the demands on this Court preclude its considering cases defective on their face as it did in two petitions involving alcoholic beverages: *United States v. Rathjen*, 31 CCPA 70 (certiorari denied 320 U.S. 797) and *Bercut* (certiorari denied 359 U.S. 953). In *Rathjen* the protest was premature because the statute involved had no savings clause in favor of existing international obligations and in *Bercut* the importers sought excessive refunds under Article III by not limiting their claims to those after January 1, 1948, as the Protocol of Provisional Application required (Pet., pp. A 20-1). Here there is a savings clause and the claim is limited to charges after January 1, 1948. Moreover, the Brief in Opposition failed to find any errors in the points Petitioners present—as contrasted with those erroneously attributed to them.[1]

Here the case is not one of technical issues of importance primarily to the importers concerned, which an overworked Court must necessarily reject. Such errors if

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1. The Brief in Opposition (p. 7 n. 8) also erroneously states that petitioners ignored the rectification tax. As the Petition (p. 7 n. 8) explained, Petitioners limitation of their claim to the $1.50 increase by the Act of 1951 made that tax irrelevant. The Act did not increase the rectification tax and the savings by a proof gallon assessment on domestic products on a $9 tax more than offset it.

long continued in the domestic field usually are corrected on certiorari when serious conflicts of decisions in the circuits develop. In customs matters, such conflicts seldom arise because of the exclusive jurisdiction of the Court of Customs Appeals. Here, however, *Parrott* provides a clear conflict in principle as to what effect should be given to a provision substantially the same as Article II of the General Agreement.

In some cases, as in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, action by the Judiciary may embarass the Executive Branch in its international dealings. But this is not an instance in which the Court is asked to sit in judgment on the acts of another government. Here the Court will only be correcting a decision of a subordinate American tribunal. So long as the decision stands it will provide a bulwark for those seeking protection and a handicap to those seeking to bring American practices into accord with those of other countries—and with the *Parrott* case concerning the Virgin Islands.

The judiciary is the branch of the government which interprets its laws. At present the law of the land with respect to Article II rests upon the fleeting consideration given it by the Court of Customs and Patent Appeals in *Bercut* (p. 32) and in this case (Pet., p. A12). That Court did not consider the standard rules of construction, the legislative history of the competing provisions, the evils which they sought to cure or the many other techniques experience has provided to assist in rendering sound judgments. Petitioners submit that past performance make it obvious that the Court of Customs and Patent Appeals will not reconsider its conclusions.

Petitioners urge that Article II has not had its day in court and will not unless this Court grants a writ of certiorari.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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